

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 30

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PETER COLIN WESTON BURT

MAILED

Appeal No. 2003-0665
Application No. 09/379,492

SEP 23 2003

HEARD: SEPTEMBER 10, 2003

PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Before COHEN, STAAB, and BAHR, Administrative Patent Judges.
COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 20 through 35 and 37 through 40. These claims constitute all of the claims remaining in the application.

Appellant's invention pertains to an aerosol dispenser and to method of assembling an aerosol dispenser. A basic understanding of the invention can be derived from a reading of exemplary claims 20 and 27, respective copies of which appear in the APPENDIX to the main brief (Paper No. 23).

Appeal No. 2003-0665
Application No. 09/379,492

As evidence of obviousness, the examiner has applied the documents listed below:

Ryden	3,622,053	Nov. 23, 1971
Mascia et al (Mascia)	4,341,330	Jul. 27, 1982
Welter	4,749,437	Jun. 7, 1988
Goncalves (France) ¹	2,543,923	Oct. 12, 1984

The following rejections are before us for review.²

1. Claims 20 through 22 and 27 through 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Goncalves in view of Welter.
2. Claims 23 through 25, 32 through 35, 37, and 39 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over

¹ Our understanding of this document is derived from a reading of a translation thereof prepared for the United States Patent and Trademark Office. A copy of the translation is appended to this opinion.

² As correctly pointed out to the examiner by appellant (reply brief), the earlier panel of the board in Appeal No. 2001-0471 did not suggest rejecting claims in its remand to the examiner. Instead, they advised the examiner to consider a combination of specified references and determine whether claims should be rejected.

Goncalves in view of Welter, as applied to claim 20, further in view of Mascia.

3. Claims 26, 38, and 40 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Goncalves in view of Welter, as applied to claim 20, further in view of Ryden.

The full text of the examiner's rejections and response to the argument presented by appellant appears in the answer (Paper No. 24), while the complete statement of appellant's argument can be found in the main and reply briefs (Paper Nos. 23 and 26).

OPINION

In reaching our conclusion on the obviousness issues raised in this appeal, this panel of the board has carefully considered appellant's specification, and claims, the applied teachings,³

³ In our evaluation of the applied prior art, we have considered all of the disclosure of each document for what it would have fairly taught one of ordinary skill in the art. See In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966). Additionally, this panel of the board has taken into account not only the specific teachings, but also the inferences which one skilled in the art would reasonably have been expected to draw
(continued...)

and the respective viewpoints of appellant and the examiner. As a consequence of our review, we make the determinations which follow.

The first rejection

We sustain the rejection of claims 20 through 22 and 27 through 31 under 35 U.S.C. § 103(a) as being unpatentable over Goncalves in view of Welter.

Claim 20 appears below.

An aerosol dispenser comprising a body, a closure sealed to the body, and means for dispensing material from the interior of the dispenser, wherein the closure is welded ultrasonically to the body by a metal-to-metal weld.

The Goncalves reference (translation, page 2) teaches an aerosol bomb type pressurized container wherein the container body 2 and container dome 3 are made as one piece by welding carried out by means of a pencil laser beam (Figs. 1 through 5).

³(...continued)
from the disclosure. See In re Preda, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

As explained by Goncalves (translation, pages 2, 5, 6 and 10), the pressurized containers of the present invention are used "for example for packaging and distribution of cosmetic or cleaning products." Further, as disclosed (translation, page 5), the laser welded body and dome allows one to avoid crimping of these parts together, while a valve holder cap is crimped to the dome. Flat (plane) annular surface areas are laser welded together (translation, page 6).⁴

The patent to Welter addresses a variably-weighted ultrasonic welding horn that is indicated as having uses for several purposes including the joining of metals (column 1, lines 1 through 14). According to the patentee, ultrasonic welding is used in place of the application of heat (high temperatures) causing the intermolecular bonding of overlapping worksurfaces. The applications mentioned by Welter include ultrasonic sealing of metal containers broadly (abstract) and, more specifically,

⁴ It is worthy of noting that, akin to the Goncalves teaching (translation, page 5), appellant seeks (specification, page 2) to have the closure of an aerosol dispenser having a body "welded to the body by a metal-to-metal weld" to replace a known crimped connection between the closure and body. According to appellant (specification, page 2), "[p]referably the welding is carried out ultrasonically."

hermetically closing the rolled end of a toothpaste-like tube
(column 1, lines 14 through 28).

In applying the test for obviousness,⁵ we reach the conclusion that it would have been obvious to one having ordinary skill in the art to effect the weld of Goncalves by means of ultrasound in place of a laser. From our perspective, the incentive on the part of one having ordinary skill in the art for making the proposed modification of Goncalves would have simply been to gain the art recognized advantages of an alternative ultrasound method of applying a weld to a container (used where high temperatures are impractical and/or to obtain a uniform weld), as disclosed by Welter.⁶

⁵ The test for obviousness is what the combined teachings of references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

⁶ Claim 20 includes a product by process limitation as to the forming of the metal-to-metal weld. With that in mind, we simply note that the issue of whether a laser formed weld differs from a ultrasonically formed weld has not been addressed.

The argument of appellant (main brief, pages 5 through 7) fails to persuade us of error on the part of the examiner in making this rejection. Contrary to appellant's point of view (main brief, pages 5 and 7), and as articulated above, there is the requisite motivation or suggestion in the prior art itself to make the proposed combination, and appellant's specification is not relied upon at all in this respect. Appellant points to an absence in the references of a teaching of the "equivalence" of laser and ultrasonic welding (main brief, pages 6 and 7). However, under 35 U.S.C. § 103, equivalence is not determinative, obviousness is. As evident from our analysis, supra, one having ordinary skill in the art, assessing the applied art as a whole, would comprehend laser and ultrasound welding as art alternatives. For the reasons already given, we do not share appellant's point of view (main brief, page 6) that the rejection is based upon "hindsight or at most 'obvious to try'." Notwithstanding appellant's view to the contrary (main brief, page 6), like the examiner (answer, page 5), we readily perceive that Goncalves (Fig. 2) is responsive to claim 22 by disclosing collars 7,9 (flanges) that are outwardly directed and flat. Since appellant did not separately argue each of claims 21 and 27

through 31, they stand or fall with claim 20, the rejection of which we have sustained.

The second rejection

We cannot sustain the rejection of claims 23 through 25, 32 through 35, 37, and 39 under 35 U.S.C. § 103(a) as being unpatentable over Goncalves in view of Welter and Mascia.

The patent to Mascia merely depicts an aerosol container with what may be fairly understood by one having ordinary skill in the art to be a rolled (and crimped) connection between an upper closure unit 16 and the container body 14. No welding is apparent in this reference. We share appellant's point of view that the applied Mascia reference, in particular, would not have been suggestive of modifying the Goncalves teaching, for the following reasons. Goncalves expressly seeks to avoid crimping, and Mascia does not address a welded connection. Thus, we cannot sustain the rejection of claim 23 through 25, 32 through 35, 37, and 39.

The third rejection

We cannot sustain the rejection of claims 26, 38, and 40 under 35 U.S.C. § 103(a) as being unpatentable over Goncalves in view of Welter, as applied to claim 20, further in view of Ryden.

The claimed subject matter addresses an aerosol dispenser that is an inhaler with a medicament.

In our opinion, the collective teachings of Goncalves and Welter (as applied above) and Ryden (dispenser for the oral administration, by inhalation, of medicinal compositions) would not have been suggestive of the now claimed invention. Absent the application of impermissible hindsight, this panel of the Board fails to discern any suggestion in the applied teachings for the major reconfiguration of the Goncalves dispenser (with its finger operated, push button 13 controlled valving suitable for dispensing cleaning fluids and cosmetics) to yield an aerosol dispenser that is an inhaler with a medicament, as now claimed. It is for this reason that the rejection of claims 26, 38, and 40 cannot be sustained.

Appeal No. 2003-0665
Application No. 09/379,492

In summary, this panel of the board has sustained the first rejection, but has not sustained the second and third rejections.

The decision of the examiner is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART


IRWIN CHARLES COHEN
Administrative Patent Judge

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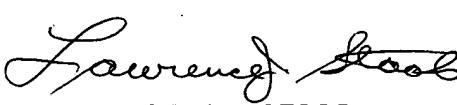
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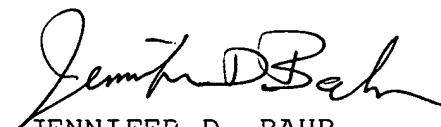
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LAWRENCE J. STAAB
Administrative Patent Judge

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JENNIFER D. BAHR
Administrative Patent Judge

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Appeal No. 2003-0665
Application No. 09/379,492

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